A

Thiruchelvan a/l Thuryrajoo v Pengerusi Lembaga Pencegahan Jenayah & Ors

B HIGH COURT (IPOH) — CRIMINAL APPLICATION NO AA-44–20–02 OF 2018
ANSELM FERNANDIS JC
25 OCTOBER 2018

C *Criminal Procedure — Habeas corpus — Application for — Writ of habeas corpus against legality of detention order — Failure of inquiry officer to explain delay — Priority of reporting grounds and finding — Whether respondent failed to comply with s 10(2) of the Prevention of Crime Act 1959*

D The applicant was arrested under s 3(1) of the Prevention of Crime Act 1959 ('the Act') on 19 September 2017. On 20 September 2017 a detention order for the purpose of investigation was issued by the deputy registrar. The detention order was for the applicant to be detained for a period of 21 days
E commencing on 20 September–10 October 2017. On 10 October 2017 the applicant was brought before the magistrate and the magistrate ordered the applicant to be remanded in custody for a period of 38 days until 16 November 2017. In the proceedings before the magistrate a written statement by the deputy public prosecutor was produced where the deputy public prosecutor
F was of the opinion that there was sufficient evidence to justify holding an inquiry under s 9 of the Act by an inquiring officer. On 13 October 2017 at 9am the inquiry officer held an inquiry in accordance with s 9 of the Act. The inquiry was held three days after the order was given by the magistrate. In her affidavit at encl 4 para 13 she explained that the reasons for the delay were that,
G among other things, she had to examine witnesses and analyse their evidence. The inquiry officer had prepared and completed her findings under s 10(2) of the Act on 17 October 2017. She also forwarded her findings to the officer having custody of the applicant. She later confirmed that her findings had been received by the applicant on the 17 October 2017 itself. She deposed that on
H the 10 November 2017 she had reported her finding and grounds to the Crime Prevention Board ('the board'). The board thereafter directed that the applicant be detained under a detention order dated 14 November 2017 under s 19A(1) of the Act. The issue for consideration was whether the respondent had failed to comply with s 10(2) of the Act.

I **Held**, allowing the application for habeas corpus:

(1) Although the inquiry officer had explained about the three days delay from the second remand order to the date she met the applicant to conduct the inquiry, there was no explanation at all by her in respect of

the 23 days delay from 17 October–10 November 2017 in forwarding the report to the board. Nor was there an explanation why she did not report her grounds and finding to the board first before serving a copy of the finding on the applicant. The reporting of the grounds and finding of the inquiry officer ought to have been the priority as envisaged in s 10(2) of the Act rather than the forwarding of the finding to the officer having custody of the applicant. Although there was no time frame stated in s 10(2) of the Act for the grounds and finding to be reported to the board, it did not mean that the actions of the inquiry officer was not regulated by any time frame what so ever (see paras 18–21).

(2) The affidavit only stated that she had followed the correct procedures in making the report to the board. Therefore, there was a breach of a procedural requirement of s 10(2) of the Act and the detention of the applicant under s 19A(1) of the Act was invalid (see paras 26–28).

[Bahasa Malaysia summary

Pemohon telah ditangkap di bawah s 3(1) Akta Pencegahan Jenayah 1959 ('Akta') pada 19 September 2017. Pada 20 September 2017 satu perintah tahanan untuk tujuan siasatan dikeluarkan oleh timbalan pendaftar. Perintah penahanan adalah untuk pemohon ditahan selama tempoh 21 hari bermula pada 20 September–10 Oktober 2017. Pada 10 Oktober 2017 pemohon dibawa di hadapan majistret dan majistret mengarahkan pemohon untuk ditahan dalam jagaan untuk tempoh 38 hari sehingga 16 November 2017. Dalam prosiding di hadapan majistret suatu pernyataan bertulis oleh timbalan pendakwa raya telah dibuat di mana timbalan pendakwa raya berpendapat bahawa terdapat bukti yang mencukupi untuk membenarkan menjalankan siasatan di bawah s 9 Akta oleh seorang pegawai penyiasat. Pada 13 Oktober 2017 jam 9 pagi pegawai penyiasat mengadakan siasatan mengikut s 9 Akta. Siasatan diadakan tiga hari selepas perintah itu diberikan oleh majistret. Dalam afidavitnya di lampiran 4 perenggan 13 beliau menjelaskan bahawa sebab-sebab penangguhan itu, antara lain, beliau perlu memeriksa saksi dan menganalisis bukti. Pegawai penyiasat telah menyediakan dan menyelesaikan penemuannya di bawah s 10(2) Akta pada 17 Oktober 2017. Beliau juga mengemukakan penemuannya kepada pegawai tahanan pemohon. Beliau kemudian mengesahkan bahawa penemuannya telah diterima oleh pemohon pada 17 Oktober 2017. Beliau bersumpah bahawa pada 10 November 2017 beliau telah melaporkan penemuan dan alasan beliau kepada Lembaga Pencegahan Jenayah ('lembaga'). Lembaga kemudiannya mengarahkan supaya pemohon ditahan di bawah perintah tahanan bertarikh 14 November 2017 di bawah s 19A(1) Akta. Isu untuk pertimbangan adalah sama ada responden gagal mematuhi s 10(2) Akta.

Diputuskan, membenarkan permohonan habeas corpus:

(1) Walaupun pegawai penyiasat telah menjelaskan tentang kelewatan tiga

hari dari perintah reman kedua hingga tarikh beliau bertemu dengan pemohon untuk melakukan siasatan itu, tidak ada penjelasan sama sekali berkenaan dengan penangguhan 23 hari dari 17 Oktober–10 November 2017 dalam menyampaikan laporan kepada Lembaga. Tiada penjelasan mengapa beliau tidak melaporkan alasan dan dapatan beliau kepada Lembaga terlebih dahulu sebelum menyerahkan salinan dapatan kepada pemohon. Laporan alasan dan dapatan pegawai penyiasat sepatutnya menjadi keutamaan seperti yang disampaikan dalam s 10(2) Akta dan bukannya penghantaran dapatan kepada pegawai tahanan pemohon. Walaupun tiada tempoh masa yang dinyatakan dalam s 10(2) Akta untuk alasan dan dapatan untuk dilaporkan kepada Lembaga, itu tidak bererti bahawa tindakan pegawai penyiasat tidak dikawal oleh apa-apa tempoh masa (lihat perenggan 18–21).

(2) Afidavit hanya menyatakan bahawa beliau telah mengikut prosedur yang betul dalam membuat laporan itu kepada lembaga. Oleh itu, terdapat pelanggaran keperluan prosedur s 10(2) Akta dan penahanan pemohon di bawah s 19 (1) Akta tidak sah (lihat perenggan 26–28).]

Notes

For cases on application for habeas corpus, see 5(2s) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2617–2624.

Cases referred to

Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal [2006] 1 MLJ 320; [2005] 4 CLJ 445, FC (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] MLJU 667, FC (refd)

Menteri Dalam Negeri & Ors v Gopal a/l R Subramaniam [2017] 4 MLJ 1; [2017] 6 CLJ 593, FC (folld)

Mohan a/l Lachumanan lwn Timbalan Pengerusi, Lembaga Pencegahan Jenayah dan lain-lain [2018] 6 MLJ 314; [2018] 1 LNS 1003, CA (refd)

Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (refd)

SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705, FC (refd)

Sathiyamurthi v Penguasa/Komandan, Pusat Pemulihan Karangan, Kedah [2006] 6 MLJ 593; [2006] 4 CLJ 862, FC (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 54(2)

Prevention of Crime Act 1959 ss 3(1), 4, 4(1)(a), (2)(a), (2)(a)(i), (2)(a)(ii), 6, 9, 9(1), (3)(d), 10, 10(2), 11(1), 15A, 19A(1)

Sundarajan a/l Sokalingam (Sundarajan & Assoc) for the applicant.

Muhammad bin Sinti (Federal Counsel, Ministry of Home Affairs) for the respondents.

Anselm Fernandis JC:

THE INTRODUCTION

[1] Thiruchelvan a/l Thuryrajoo ('the applicant') was arrested under s 3(1) of the Prevention of Crime Act 1959 ('the Act') on the 19 September 2017. On the 20 September 2017 a detention order for the purpose of investigation under s 4(1)(a) of the Act was issued by the deputy registrar. The detention order was for the applicant to the detained for a period of 21 days commencing on 20 September–10 October 2017. In the course of the proceedings before the deputy registrar a statement in writing by a police officer under s 4(1)(a) of the Act was produced. The said statement stated there were grounds for believing that the applicant's name be entered on the register kept by the registrar of criminals.

[2] Subsequently on the 10 October 2017 the applicant was brought before the magistrate under s 4(2)(a) of the Act. The magistrate ordered the applicant to be remanded in custody for a period of 38 days until 16 November 2017. In the proceedings before the magistrate a written statement by the deputy public prosecutor under s 4(2)(a)(i) was produced. The deputy public prosecutor was of the opinion that there was sufficient evidence to justify holding an inquiry under s 9 of the Act by an inquiring officer. Also adduced before the magistrate was a written statement by the police officer of the rank of assistant superintendant of police under s 4(2)(a)(ii) of the Act stating that it is intended to hold an inquiry into the case of the applicant under s 9 of the Act.

[3] On the 13 October 2017 at 9am the inquiry officer held an inquiry in accordance with s 9 of the Act. The aim of the inquiry was to determine whether there are reasonable grounds her believing that the applicant is member of any of the registrable categories.

[4] The inquiry was held three days after the order was given by the magistrate. In her affidavit at encl 4 para 13 she explained that the reasons for the delay were that, among other things, she had to examine witnesses and analyse their evidence.

[5] The inquiry officer had prepared and completed her findings under s 10(2) of the Act on the 17 October 2017. She also forwarded her findings to the officer having custody of the applicant. She later confirmed that her findings had been received by the applicant on the 17 October 2017 itself. She was also informed that the applicant did not want to seek a review of her

A decision under s 11(1) of the Act.

[6] She deposed that on 10 November 2017 she had reported her finding and grounds to the crime prevention board (the board) under s 10(2) of the Act. The report contained the findings as well as grounds to the findings. Her report also contained a 'statement in which the evidence was received' during the inquiry as required under s 9(3)(d) of the Act. The board thereafter directed that the applicant be detained under a detention order dated 14 November 2017 under s 19A(1) of the Act.

C THE APPLICABLE LAW

[7] It is trite law that in the event of a challenge is made as to the legality of the order of detention, the burden of proof is on the respondent to show that the detention was lawful and it had followed the mandatory procedural requirements (*Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] MLJU 667, *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320; [2005] 4 CLJ 445 and *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705).

[8] Section 15A of the Act sets the limit as to the nature of the challenge that can be made against the order made by the board. It limits the challenge to 'any question on compliance with any procedural requirement' under the Act. In the case of *Lee Kew Sang* the Federal Court stated that 'the first thing the court should do is to see whether the ground forwarded is one that falls within the meaning of the procedural non-compliance'.

[9] Once the respondent shows that there is a breach of the mandatory procedural requirements it matters not whether the applicant is prejudiced by such breach. Augustine Paul FCJ in delivering the decision of the Federal Court in the case of *Sathiyamurthi v Penguasa/Komandan, Pusat Pemulihan Karangan, Kedah* [2006] 6 MLJ 593; [2006] 4 CLJ 862 made the following observations with regard to the breach of a procedural requirement:

> Thus, in a writ of habeas corpus, the question for the court to determine is whether the person is lawfully detained. If he is, the writ cannot be issued and if he is not, it must be issued (see *R v Home Secretary, Ex parte Greene* [1941] 3 All ER 104). The lawfulness of a detention would depend upon whether the breach complained of is mandatory or directory. A mandatory requirement is one that is of direct relevance to the detention. A breach of it will entitle a person to a writ of habeas corpus without the need to establish prejudice. A breach of a requirement which is directory will not be significant provided that there is substantial compliance and there is no prejudice.

[10] Finally any procedural challenge must confine only to the current detention order against the applicant. In *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613, the Federal Court held:

> The general rule that a writ of habeas corpus must be directed against the current order of detention therefore applies where a detention under s 6(1) has been made subsequent to an arrest and detention under s 3(1) and (2). It follows that where a detention order has been made under s 6(1) the writ of habeas corpus must be directed only against that order even if the earlier arrest and detention are irregular. This view is supported by *Barnardo v Ford* [1892] AC 326 where Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. Thus, any irregularity in a detention order made under s 3(2) when it has been superseded by one under s 6(1) is not a relevant matter for consideration. In this regard, *The Law of Habeas Corpus* (2nd Ed) by RJ Sharpe says at p 179:
>
> > It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the Court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the Court, unless by reason of some special consideration arising from the particular proceedings.

ISSUES RAISED

[11] During the course of submission counsel for the applicant raised only one issue namely that the respondent had failed to comply with s 10(2) of the Act. The relevant parts of s 10 are reproduced here for ease of reference:

> 10(1) If the Inquiry Officer is satisfied that there are no sufficient grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories, he shall report his finding, together with his reasons for it, to the Board, and shall forward a copy of his finding to the officer having custody of the person, who shall forthwith serve a copy of the finding of the Inquiry Officer on that person.
>
> (2) If the Inquiry Officer is satisfied that there are reasonable grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories, he shall report the grounds, together with his finding, to the Board, and shall forward a copy of his finding to the officer having custody of the person, who shall forthwith serve a copy of the finding of the Inquiry Officer on that person.
>
> (3) ...

[12] It was submitted by counsel for the applicant that the inquiry officer had completed her finding on the 17 October 2017. A copy of the finding was forwarded to assistant superintendent of police Mohd Akmalrizal bin Radzi on the 17 October 2017. The finding was served on the applicant on the same day at 6pm. The inquiry officer however only reported her finding and grounds to the board on the 10 November 2017. There was therefore a delay of 23 days between the forwarding of the copy of the finding to the applicant and the reporting of the grounds and finding to the board. Counsel for the respondent argues that this was an inordinate delay which was left unexplained by the inquiry officer.

[13] Learned senior federal counsel ('SFC') submitted that there was no stipulation as to the time in which the grounds and finding must be reported to the board. He referred to s 6 of the Act which stated that every person remanded in custody under s 4 of the Act be brought as soon as possible before an inquiry officer. The applicant's second remand commenced on the 10 October 2017. In this respect the inquiry was conducted on the 13 October 2018 and her finding was completed by the 17 October 2017 when it was forwarded to assistant superintendent of police Mohd Akmalrizal bin Radzi to be server to the applicant.

[14] The learned SFC asserted that there was no inordinate delay in the inquiry being held as it was held three days after the second remand. The finding of the inquiry officer was completed and forwarded to the applicant seven days after the second remand. He argued that the word 'forthwith' in s 10(2) referred to the serving of the finding to the applicant. it was not in relation to the completion of the report by the inquiry officer to the board.

FINDINGS OF THE COURT

[15] I had examined the affidavits of the inquiry officer at encl 4. I am satisfied that the applicant was brought before the inquiry officer at the soonest possible time after the second remand order was made. This was in compliance with s 6 of the Act.The delay of three days was not inordinate in the circumstances. In any event the inquiry officer had explained the delay where at encl 4 para 13 she gave her reasons for the delay as follows:

> Saya sesungguhnya menyatakan bahawa inkuiri telah dijalankan pada 13-10-2017 kerana:
>
> (a) Saya perlu membaca serta meneliti fail kes ke atas Pemohn yang mengandungi keterangan-keterangan ke atas Pemohon:
>
> (b) Saya juga perlu meneliti8 kesemua dokumen-dokumen yang terdapat di dalam fail Pemohon;
>
> (c) Saya perlu meneliti dan memeriksa saksi-saksi yang perlu dipanggil;

(d) Saya perlu memberikan masa untuk pihak polis mengesan dan menjejaki saksi-saksi yang perlu di dalam inkuiri ini;

(e) Saya perlu mendapatkan keterangan daripada saksi-saksi yagn terlibat di dalam kes ini untuk saya membuat inkuiri terhadap pemohon; dan

(f) Saya perlu membuat analisa dan kesimpulan daripada saksi-saksi yang telah membuat/memberi keterangan kepada saya.

Oleh itu, saya sesungguhnya percaya bahawa masa yang saya ambil untuk mengadakan inkuiri adalah munasabah dan masih di dalam tempoh reman 38 hari yang diberi oleh undang-undang dan perlu membolehkan saya menjalankan tugas inkuiri terhadap Pemohon dengan lebih telus, adil dan lebih berkesan.

[16] After considering the reasonings given by the inquiry officer for the three day delay I find that there was substantial procedural compliance by the inquiry officer on this point. See *Mohan a/l Lachumanan lwn Timbalan Pengerusi, Lembaga Pencegahan Jenayah dan lain-lain* [2018] 6 MLJ 314; [2018] 1 LNS 1003.

[17] In considering the procedural requirements of s 10(2) of the Act, I note that it is imperative that the inquiry officer report her grounds and her finding to the board, and shall forward 'a copy' of her finding to the officer having custody of the applicant, who shall forthwith serve a copy of the finding to the inquiry officer on applicant. A perusal of the sections suggests that the grounds and findings of the inquiry officer 'shall' be reported to the board first. Only a copy of the finding shall be forwarded to the person having custody of the applicant for the purpose of having it forthwith served on him.

[18] In the present case it is undisputed that the finding by the inquiry officer was communicated and served on the applicant on 17 October 2017. The finding and grounds were reported to the board on 10 November 2017. It was therefore only after 23 days from the serving of the copy of the finding on the applicant was the original copy of the finding and grounds reported to the board.

[19] Although the inquiry officer had explained about the three days delay from the second remand order to the date she met the applicant to conduct the inquiry, there was no explanation at all by her in respect of the 23 days delay from 17 October–10 November 2017 in forwarding the report to the board.

[20] Nor was there an explanation why she did not report her grounds and finding to the board first before serving a copy of the finding on the applicant. An explanation was all the more wanting where the words of the section indicate that compliance with the section was mandatory rather than merely directory.

[21] Further on this point is the fact that the purpose of the inquiry was to 'report in writing to the Board as to whether there are reasonable grounds the Applicant was a member of any of the registrable categories'. This is clearly stated in s 9(1) of the Act under the heading 'Duties and Powers of the Inquiry Officers'. The relevant part of s 9(1) states as follows:

> 9(1) When any person is brought before an Inquiry Officer under section 6 the Inquiry Officer *shall inquire and report in writing to the Minister* whether there are reasonable grounds for believing that the person is a member of any of the registrable categories.
>
> (2) ...
>
> (3) ...

It is therefore this court's view that the reporting of the grounds and finding of the inquiry officer ought to have been the priority as envisaged in s 10(2) of the Act rather than the forwarding of the finding to the officer having custody of the applicant.

[22] Although I agree with the learned SFC that there is no time frame stated in s 10(2) of the Act for the grounds and finding to be reported to the board it does not mean that the actions of the inquiry officer is not regulated by any time frame what so ever. Section 54(2) of the Interpretation Acts 1948 and 1967 in relevant in this respect. There it clearly states:

> In computing time for the purposes of any written law —
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (2) Where no time is prescribed within which anything shall be done, that thing shall be done *with all convenient speed* and as often as the prescribed occasion arises. (Emphasis added.)

[23] I am of the opinion that in an application for habeas corpus grounded on s 10(2) of the Act with regard to the time frame for the grounds and finding to be reported to the board this court would first have to decide:

(a) whether the grounds and finding had been reported to the board 'with all convenient speed' or was there a delay; and

(b) if there was a delay the court then must consider in the circumstances of the case and the explanation for the delay.

[24] In this I am guided by the Federal Court case of *Menteri Dalam Negeri & Ors v Gopal a/l R Subramaniam* [2017] 4 MLJ 1; [2017] 6 CLJ 593 where the Federal Court took the same approach with regard to an application for habeas corpus grounded on s 10(2) of the Act revolving around the word 'forthwith'. Prasad Abraham FCJ in delivering the judgment held as follows:

> We would direct that in all application for habeas corpus grounded on s 10(2) of the POCA, revolving around the word 'forthwith' the court should approach the said applications in the following manner via:
>
> (a) if the facts of the case show that there was a delay in the officer having custody of the Applicant in serving a copy of the finding of the inquiry officer on that person, the court must then look at the affidavit of the Respondent to ascertain whether the Respondent has explained the delay sufficiently; and
>
> (b) the court then must consider in the circumstances of the case and the explanation for the delay, whether the officer acted without unreasonable delay and as soon as practicable.

[25] Although the Federal Court in *Menteri Dalam Negeri & Ors v Gopal a/l R Subramaniam* was concerned with the word 'forthwith' this court is of the opinion that the same approach could apply in the context of whether the grounds and finding had been reported to the board 'with all convenient speed'.

[26] In her affidavit at encl 4 the inquiry officer in paras 18 and 21 stated the following with regard to the reporting of the finding and grounds to the board:

> Paragraph 18:
>
> Pada 10-11-2017, saya tealh mengemukakan laporan lengkap bertulis ke atas Pemohon yang mengandungi alasan-alasan beserta Dapatan menurut subsekyen 10(2) Akta tersebut dan Borang I kepada Lembaga Pencegahan Jenayah. Sesungguhnya, laporan lengkap bertulis yang mengandungi alasan-alasan beserta Dapatan yang disediakan oleh saya menurut subsekyen 10 (2) Akta tersebut yang telah dihantar ke Lembaga Pencegahan Jenayah pada 10-11-2017 adalah sah dan sempurna serta mematuhi semua peruntukkan undang-undang.
>
> Paragraph 21:
>
> Seterusnya, saya menegaskan bahawa pada 10-11-2017, saya telah mengemukakan laporan lengkap secara bertulis serta Dapatan menurut subseksyen 10(2) Akta tersebut ke atas Pemohon kepada Lembaga Pencegahan Jenayah. Justeru itu, saya menegaskan bahawa semua proses tindakan telah disempurnakan dengan menepati segala peruntukkan undang-undang. Selanjutnya, saya sesungguhnya menyatakan bahawa tiada keperluan undang-undang untuk saya mneyerahkan sesalinan laporan saya kepada Pemohon.

[27] I am of the view that there was no explanation as to the 23 day delay in

reporting her finding and ground to the board. The affidavit only stated that she had followed the correct procedures in making the report to the board.

[28] I am therefore am of the view that there was a breach of a procedural requirement of s 10(2) of the Act. In addition to this there was also the unexplained delay of the 23 days by the inquiry officer in reporting to the board.

CONCLUSION

[29] Based on the reasons discussed I hold that the detention of the applicant under s 19A(1) of the Act is invalid and the application for a writ of habeas corpus is hereby allowed.

Application for habeas corpus allowed.

Reported by Nabilah Syahida Abdullah Salleh